

In the Matter of Milton P. Hill, Jr.

DOP Docket No. 2004-615

(Merit System Board, decided May 19, 2004)

Milton P. Hill, Jr., represented by D. William Subin, Esq., appeals the removal of his name from the County Correction Officer (S9999D), Atlantic County, eligible list on the basis that he falsified his employment application.

The appellant took the open competitive examination for County Correction Officer (S9999D), achieved a passing score, and was ranked on the subsequent list. The appellant's name was certified to the appointing authority on September 25, 2002. In disposing of the certification, the appointing authority requested that the appellant's name be removed from the subject eligible list on the basis that he falsified his employment application. Specifically, it stated that question 77 on the application asked applicants whether they ever had "police contact, been taken into custody or charged with juvenile delinquency." The appellant marked off "no" and did not list an arrest for burglary, simple assault, and criminal mischief for which he completed a Pre-Trial Intervention Program (PTI). It is noted that the appellant referenced these incidents in response to question 81. Question 81 asked applicants whether they ever had a criminal record expunged or been accepted into PTI. The appellant answered "yes" and indicated the date of the violations as October 7, 1993 and that the violations were subsequently dismissed. Moreover, the appointing authority indicated that the appellant's background check revealed that he was questioned by the Atlantic City Police Department Major Crimes Unit in relation to a homicide investigation, which the appellant did not list in Question 77. In this regard, the appointing authority provided copies of employment applications the appellant submitted to the Juvenile Justice Commission (JJC), Department of Law and Public Safety, and the Atlantic City Police Department (ACPD), where he indicated that in May 1995, he was questioned in a homicide investigation. It is noted that question 27 of the JJC application asked applicants whether they ever were "arrested, indicted, charged with or convicted of a criminal or disorderly offense in this State or any other jurisdiction? For the purpose of this question, the words 'arrest,' 'indictment' and 'charge' includes any questioning, detaining, holding, or taking into custody by any police or law enforcement authorities." Question 22(d) of the ACPD application asked applicants whether they were ever "called to testify before, or investigated by any Legislative, Grand Jury, or other official investigative body, when that body is engaged in the investigation of criminal activity." Further, the appointing authority noted that the appellant stated on his JJC application that the ACPD refused him employment because of a background check.

The matter was referred to the Merit System Board (Board) for direct review. On appeal to the Board, the appellant argued that he answered question 77 properly. He contended that the plain meaning of the question is for applicants to disclose a juvenile delinquency, disorderly persons, or criminal charge. Therefore, he was not obligated to reveal that he was questioned in the homicide investigation. Regarding the investigation, he indicated that the police were questioning him about a suspect, who was a neighbor of the appellant in 1995. Moreover, the appellant argued that the questions posed by the JJC and the ACPD asked whether he was "questioned" and therefore, he answered "yes." He noted that he was not required to answer the ACPD question either because his questioning by the ACPD Major Crimes Unit was not a custodial interrogation. He was free to leave at any time. Furthermore, the appellant argued that he was only obligated to disclose his expunged charges, which he clearly specified in his answer to question 81. He maintained that he was not attempting to deceive, mislead, or materially misrepresent his background. If that was his intention, he stated that he would not have mentioned his previous criminal charges, which were dismissed after completion of PTI and expunged.

In response, the appointing authority, represented by William P. Busch, Jr., Assistant County Counsel, reiterated its arguments as to why the appellant's name should be removed. It added that it is "ludicrous" for the appellant to think that he was not obligated to list being questioned about a murder when the application asked for "police contact."

It is noted that the appellant's name also appeared on the eligible list for County Correction Officer Recruit, Juvenile Justice (S9999D), Juvenile Justice Commission, and was certified on September 18, 2002. The appointing authority requested that the appellant's name be removed on the basis that he failed his psychological examination. The appellant did not appeal his removal. Moreover, the appellant's name appeared on the Correction Officer Recruit (S9999D), Department of Corrections, eligible list. His name was removed in May 2003 for failure to respond to the Notice of Certification.

The Division of Merit System Practices and Labor Relations (MSPLR) advised the appellant that his appeal with respect to the removal of his name from the eligible list for County Correction Officer (S9999D), Atlantic County, was moot because his name could not be restored to the pool of eligibles since his name was removed from the Correction Officer Recruit, Juvenile Justice (S9999D), Juvenile Justice Commission, eligible list by virtue of his failed psychological examination. Similarly, MSPLR advised the appellant that any appeal filed with regard to his removal from the Correction Officer Recruit (S9999D), Department of Corrections, eligible list would be moot since his

name had already been removed from the pool of eligibles. In this regard, MSPLR indicated that pursuant to *N.J.A.C.* 4A:4-2.3(c), an eligible whose name has been removed from the pool of eligibles for one jurisdiction or title area for cause shall be removed from the pool of eligibles for any other jurisdiction or title area.

The appellant disagreed with this determination, arguing that his name could not be removed entirely from the pool of eligibles because his failed psychological examination related to a position with a different job description. Additionally, he contended that the appointing authority never documented nor suggested that his name be removed from the subject eligible list for any failed psychological examination. Therefore, the appellant maintained that it cannot be considered in the instant matter. In response, MSPLR advised the appellant that the matter would proceed to the Board and that the Board would consider not only the reasons set forth by the appointing authority with respect to his removal, but also whether his removal from the eligible list for Correction Officer Recruit, Juvenile Justice (S9999D), Juvenile Justice Commission, is a basis to remove his name from all correction officer lists resulting from the law enforcement examination (S9999D). Despite being provided the opportunity, the appellant did not submit further argument or documentation.

CONCLUSION

N.J.A.C. 4A:4-6.3(b), in conjunction with *N.J.A.C.* 4A:4-4.7(d), provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to remove his or her name from an eligible list was in error. Moreover, *N.J.A.C.* 4A:4-4.7(a)1, in conjunction with *N.J.A.C.* 4A:4-6.1(a)6, allows the Board to remove an individual from an eligible list who has made a false statement of any material fact or attempted any deception or fraud in any part of the selection or appointment process. Additionally, *N.J.A.C.* 4A:4-4.7(a)11 allows the Board to remove an eligible's name from an eligible list for other valid reasons. *N.J.A.C.* 4A:4-4.7(g) states that when the Department of Personnel has accepted a single application for one or more law enforcement title areas, pursuant to *N.J.A.C.* 4A:4-2.3(c), an eligible whose name has been removed from the pool of eligibles for one jurisdiction or title area for cause shall be removed from the pool of eligibles for any other jurisdiction or title area.

The record reflects that the appellant's name was removed from the Correction Officer Recruit, Juvenile Justice (S9999D), Juvenile Justice Commission, eligible list for a failed psychological examination, and the appellant did not appeal his removal. The Board finds that the title of Correction Officer Recruit, Juvenile Justice, has as its primary focus the

duties and responsibilities required of a County Correction Officer and a Correction Officer Recruit. See *In the Matter of Michelle Kinsey* (MSB, decided December 18, 2002). Therefore, such titles constitute a single title area. Pursuant to *N.J.A.C.* 4A:4-2.3(c), since the appellant's name was removed for cause, *i.e.*, his failed psychological examination, his name must be removed from the pool of eligibles for the title area of correction officer. See *e.g.*, *In the Matter of Michael Borini* (MSB, decided June 12, 2001). The Board notes, however, that it would be impermissible to remove the appellant's name under *N.J.A.C.* 4A:4-2.3(c) if he failed a psychological examination in a different title area, such as police, sheriff's officer, and ranger, because testing is specific to each title area. Accordingly, even if the appellant were successful in his appeal of the instant matter or in an appeal of his removal from the Correction Officer Recruit, Department of Corrections (S9999D), eligible list, his name cannot be restored to the pool of eligibles (S9999D) for the title area of correction officer. Therefore, the instant matter is dismissed as moot.

Since the matter has been rendered moot, it is not necessary to review the appellant's removal from the subject eligible list on the basis of whether or not he falsified his employment application.

ORDER

Therefore, it is ordered that this appeal be dismissed as moot.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.